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**Konkola Copper Mines PLC v Nyasulu and 2000 Others Appeal No. 1/2012**

*Pamela Towela Sambo*

**Facts**

In 2012, Konkola Copper Mines Plc (KCM), being dissatisfied with the judgment of the Lusaka High Court appealed to the Supreme Court. The appellant alleged that the quantum of damages awarded by the High Court were made without the requisite finding on the ingredients of negligence nor was there evidence on record that environmental legislation had been disregarded by the appellant. The appellant further argued that the court was precluded from finding that damages were due to all the 2001 plaintiffs on the evidence of only 6 witnesses as the action was a group and not representative one. Furthermore, it was the appellant's argument that the medical evidence tendered by the respondents was dated 2010 when the incident under litigation had occurred in 2006.

The initial action was commenced in 2007 in the Lusaka High Court by 2001 plaintiffs who were residents of four communities, namely Shimulala, Hellen, Kakosa and Hippo Pool in Chingola district, Zambia. The cause of action in negligence and breach of statutory duty arose chiefly from the rupture of a tailings pipeline from Konkola Copper Mines on 6<sup>th</sup> November, 2006. This led to highly acidic effluent being discharged into the Chingola and Mushishima streams, the main sources of water in Chingola and surrounding areas.

The first defendant, Konkola Copper Mines Limited (KCM) had, from about 2006, been discharging effluent into the two streams and effectively into the Kafue River, the main source of water on the Copperbelt. The cause of action was also against the second and third defendants, the Environmental Council of Zambia, ECZ (now renamed Zambia Environmental Management Agency, ZEMA) and Chingola District Council as repositories of statutory duties.

It was alleged that the second defendant failed and/or neglected to carry out inspection or supervise the pipes in question, regularly to meet the required acceptable standards and ensure that no leakage or spillage occurred, while it was alleged that the third defendant failed to take adequate measures to mitigate and control the effects of the pollution of water supply in Chingola through the maintenance and supply of wholesome water reserves. In consequence, the supply of contaminated water had caused great pain and suffering to the plaintiffs as the third defendant collected huge sums of money in the form of rates from the first defendant, and which benefit ought to have been accruing to the plaintiffs.

In the course of proceedings, the third defendant, Chingola Municipal Council was found not to be the supplier of water to Mulonga Water, an independent limited company and was therefore disjoined, leaving the action only against the first and second defendants, KCM and ECZ.

The plaintiffs, predominantly farmers and fishermen complained of skin diseases, stomach pains, diarrhoea and chest pains after drinking the contaminated water, and in addition some of the plaintiffs complained of their sight being affected. The contaminated water was also used for cooking, drinking and bathing. There was also evidence that fish and other aquatic life in the Kafue River was dying, the water tasted bitter, river stones and reeds had changed their natural colour to bluish and greenish and precipitates of copper sulphate were visible along the river banks.

It was alleged that the first defendant, KCM had committed an offence under Section 2 of the Environmental Protection and Pollution Act Chapter 204 of the Laws of Zambia (now repealed), as well as the Water Pollution Regulations issued thereunder.

On 19<sup>th</sup> November, 2011, the High Court found that:

- (i) The repealed Environmental Protection and Pollution Control Act, Chapter 204 of the Laws of Zambia had adequate provisions to address the circumstances of the case and that the plaintiffs had proved their case against the first defendant in both Common Law and Statutory Law;

- (ii) The second defendant had discharged its statutory function as an environmental regulator and therefore bore no liability in negligence or at all, in the given circumstances;
- (iii) The first defendant deprived the community in Chingola the right to life, which is a fundamental right in the Zambian Constitution;
- (iv) More specifically, the first defendant 'was reckless and had no regard for human, animal and plant life. The only hypothesis for a powerful multinational to supposedly act with impunity and immunity, was that they thought they were politically correct and connected';
- (v) That the court was duty bound to 'protect poor communities from the powerful and politically connected' and agreed 'that the first defendant was shielded from criminal prosecution by political connections and financial influence, which put them beyond the reach of criminal justice;'
- (vi) The court ordered KCM to pay Four Million Kwacha (K4m) to each of the 2000 plaintiffs as general damages, One Million Kwacha (K1m) as punitive damages, being a total of Ten Billion Kwacha (K10 billion) in order 'to deter others who may discharge poisonous substances without diminishing their potency not to cause harm to the environment, human beings, animals, etc.'
- (vii) The court reiterated that 'this was lack of corporate responsibility and criminal and a tipping point for corporate recklessness,' awarding costs to the plaintiffs, with damages to attract Bank of Zambia long-term deposit rate from the date of issuance of the writ of summons to the date of judgment, thereafter at short-term deposit rate until full and final payment, costs will be taxed in default of agreement.
- (viii) In the words of the court, 'this judgment may appear to be investor unfriendly, but that is having a dim view to KCM's don't care attitude whether human life which sacrosanct in our Constitution was lost or not. International investors should observe high environmental standards, that is a global approach. Some nations like China even criminalise the bringing into their countries of obsolete technology. The fact that the host country (Zambia) is in dire need of foreign investment to improve the well-being of its people, does not mean its people should be dehumanised by 'Greed and Crude Capitalism', which puts profit above human life.'

### **The Holding**

On 2<sup>nd</sup> April, 2015, the Supreme Court delivered its unanimous verdict and found that:

1. Based on the provisions of section 24 of the repealed Environmental Protection and Pollution Control Act, Chapter 204 of the laws of Zambia, read together with the Water Pollution Control Regulations 1993 issued thereunder, the appellants owed the respondents a statutory duty. By discharging highly acidic effluent that was harmful to the aquatic environment, infrastructure and agriculture pursuits around Chingola, the Supreme Court found that the appellant had breached this statutory duty;
2. In relation to the nature of the action, the court found that it was representative; that the High Court, was, however, seriously misdirected in proceeding to award uniform damages for all the 2001 respondents on the basis of only 12 un-identical medical reports. Having established that the appellant had polluted the water source relied on by the respondents, the High Court ought to have referred the matter for assessment of damages. The Supreme Court emphasised that specific evidence of the actual loss or injury was important in order to serve the interests of justice, and further that damages for personal injuries should only be awarded on the basis of credible medical evidence;

3. Accordingly, the award for damages was set aside, with an order for the parties to bear their own costs.

### Significance

This judgment was delivered in 2015 and since then has raised immense publicity in Zambia and beyond. The importance of this case is particularly with regard to environmental liability for multinational investing entities, which is neatly intertwined with human rights violations and natural resources exploitation among other pertinent legal issues. Further, it is important to review this case, albeit belatedly, because it is being used as a reference point for environmental liability for mining companies in Zambia. Furthermore, the *Nyasulu* case is based on the same facts as the now world-famous UK litigation involving Zambian claimants, *Lungowe and others v. Vedanta Resources Plc and Konkola Copper Mines Plc*.

It is important from the outset to note that the Supreme Court did not interfere with the High Court's finding of environmental liability against KCM. This in itself is telling. The evidence of pollution against KCM was overwhelming. This was compounded by the fact that this was not the only case against the mining giant for pollution-related matters, in and around Chingola. According to the High Court:

KCM disregarded environmental legislation at a time, when there is concerted international effort especially by the United Nations Environmental Program (UNEP) to protect the environment. Such disregard for human life was received by this court with a sense of outrage. Accordingly, KCM must bear moral, criminal and civil liability for this appalling tragedy. Here is a multinational enterprise, which has no regard for human life for the sake of profit and turned the residents of Chingola into 'Guinea Pigs' and showed no remorse. In their countries of origin such recklessness would have been visited by severe criminal and civil sanctions.<sup>1</sup>

It is significant to mention that the High Court found that in the countries of origin of most multinational enterprises such 'recklessness would have been visited by severe criminal and civil sanctions.' KCM is a subsidiary of Vedanta Resources Plc, which according to information on its website is a 'globally diversified metals and mining company with its headquarters in London, United Kingdom.'<sup>2</sup> In most of the developed countries such as the United Kingdom and United States, stringent environmental standards are enforced for multinational enterprises, especially those in the extractive industries such as mining, while the same cannot be said to hold true in respect of developing countries such as Zambia.<sup>3</sup>

Section 24 of the Environmental Protection and Pollution Act Chapter 204 of the Laws of Zambia (now repealed) provided that:

No person may discharge or apply any provisions, toxic, erotoxic, obnoxious or obstructing matter, radiation or other pollutant or permit any person to dump or discharge such matter or pollutant into aquatic environment in contravention of the water pollution control standards established by the council under this part.

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<sup>1</sup>James Nyasulu and 2000 others v. Konkola Copper Mines Plc, Environmental Council of Zambia and Chingola Municipal Council 2007/HP/1286 (unreported) 20

<sup>2</sup><https://www.vedantaresources.com/Pages/Home.aspx>

<sup>3</sup> See generally C Mulenga, 'Judicial Mandate in Safeguarding Environmental Rights from the Adverse Effects of Mining Activities in Zambia' (2019) Potchefstroom Electronic Law Journal, Vol. 22, available at SSRN: <https://ssrn.com/abstract=3377116>; J Lindahl, 'Environmental impacts of mining in Zambia: Towards better environmental management and sustainable exploitation of mineral resources' (2014), available at <http://resource.sgu.se/produkter/sgurapp/s1422-rapport.pdf> (accessed on 11th May, 2019); F Cronjé, S Reyneke, and D Van Wyk, 'Local communities and health disaster management in the mining sector', (2013) Journal of Disaster Risk Studies 5(2), Art. #78, 12 pages. <http://dx.doi.org/10.4102/jamba.v5i2.78>

Further, according to the Water Pollution Control Regulations 1993 issued pursuant to the repealed Environmental Protection and Pollution Act Chapter 204 of the Laws of Zambia, a pollutant was defined as:

Any substance or energy which if it enters or is discharged into water may cause discomfort to or endanger the health, safety and welfare of persons or may cause injury or damage to plant or animal life or property, or which may interfere unreasonably with the normal enjoyment of life, or property or conduct or business and those objects or substance as may obstruct or divert the natural flow of water course when discharged or dumped into it.

In this case, KCM had negligently discharged highly acidic effluent in the main waterways which supplied water to Chingola, with the effect that the health and way of life of Chingola residents was disrupted and the environment severely polluted.

According to part of the overwhelming evidence of negligence leading to life-threatening pollution:

KCM... employed an ill-qualified environmental coordinator 'a craftsman in survey drafting', not schooled in environmental protection. He was an incredible witness. They did not add lime to the discharge, when lime was abundant on the market, when they very well knew that, that act or omission would harm human and animal life and aquatic plants.<sup>4</sup>

This finding of negligence on the part of KCM has had severe implications for environmental wellbeing in Chingola. At the time the Supreme Court decision was delivered, a model piece of legislation, the Environmental Management Act, No. 12 of 2011 had already been enacted to replace the Environmental Protection and Pollution Act. It was therefore open to the Supreme Court to utilise some of the innovative provisions<sup>5</sup> of the then new legislation to order environmental remediation against KCM. This omission, together with the aspect of the inadequacy of damages eventually awarded to the claimants who lost their livelihood as subsistence farmers has led to a multiplicity of actions<sup>6</sup> in search of justice outside this jurisdiction.

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<sup>4</sup>James Nyasulu and 2000 others v. Konkola Copper Mines Plc, Environmental Council of Zambia and Chingola Municipal Council 2007/HP/1286 (unreported) 19

<sup>5</sup> Sections 4-6 providing for the right to clean, safe and healthy environment, duty to protect the environment and principles of environmental management; section 105 on environmental restoration and many others.

<sup>6</sup>For instance, the case of Vedanta and KCM v. Lungowe and others[2019] UKSC 20, a case involving over 1, 800 Zambian claimants which started in the Technology and Construction Court, Queen's Bench Division, High Court of Justice which is mandated to hear large scale group personal injury claims. The matter eventually proceeded to the UK Supreme Court on preliminary procedural issues and is scheduled to be heard on the substantive issues in the course of 2019.